and after the negotiations leading up to the execution of the lease and was specifically confirmed in Exhibit C to the Lease. Because of the configuration of the tower, Rainbow made the decision that it was worthwhile to lease the top slot on the tower in early 1986, even though actual operation of its television station was several years away, in order to obtain the benefits of the top slot for itself and to prevent those benefits from being obtained by a potential competitor. Had the Bithlo tower been configured in such a way that there were two available television antenna positions at the same level of the tower, there would have been no need for Rainbow to lease either position until the other position was taken, and no competitive advantage to be derived from doing so.

13. Since entering into the January 6, 1986 Lease, Rainbow has paid Bithlo and Gannett more than $300,000 in rent. Because various legal challenges to Rainbow's construction permit were only recently resolved in the United States Supreme Court, Rainbow has yet to broadcast its first television program.

14. Based upon Bithlo's representations and the January 6, 1986 Lease Agreement, Rainbow filed a site change application requesting leave to relocate its antenna to the Bithlo tower and install its transmitter in the transmitter building adjacent to the tower. Rainbow's site change application was approved by the FCC.

15. As explicitly confirmed in a January 14, 1986 letter to Rainbow's engineering consultant, attached as Exhibit 3, the top slot leased by Rainbow is slightly more than 46 feet in height, beginning at a height of 1470 feet above ground and ending at a height of 1516.7 feet above ground. This 46.7-foot interval forms the center of a 360-degree cylinder which constitutes the "aperture" of the Rainbow antenna slot. The radiation center of the top slot is approximately 1493 feet above ground. Operating from the top slot of the Bithlo tower enables the broadcaster to transmit its signal to the widest possible television audience, an audience which includes Orlando, Melbourne and Daytona Beach. A leasehold conferring possession of this space is a valuable asset.

16. Had Rainbow been unable to lease the top slot on the Bithlo tower, it would not have entered into the January 6, 1986 Lease. Under those circumstances, Rainbow would have leased space on another tower, built its own tower or simply waited until an antenna location was actually needed before leasing tower space.

17. In October of 1990, Gannett informed Rainbow that it intended to allow Press Broadcasting Company ("Press"), a competitor of Rainbow's, to place a television antenna on the Bithlo tower within the aperture previously leased to Rainbow. On July 9, 1991, Gannett advised Rainbow by letter that it had entered into a lease with Press which permits Press to place a television antenna on the Bithlo tower at approximately 1502 feet above ground. A copy of Gannett's July 9, 1991 letter is attached as Exhibit 4. Gannett's execution of such a lease with Press is a breach of Rainbow's January 6, 1986 Lease.

18. Press is a commercial television broadcaster in the Orlando market and a competitor of Rainbow. Press currently broadcasts from Orange City, Florida, approximately 20 miles north of Orlando, as Channel 68. From its present location, Press covers a portion, but not all, of the market area Rainbow intends to cover. Press has obtained approval from the FCC to swap its license with Brevard Community College, which owns a license to broadcast on Channel 18. (That decision is on appeal.) The FCC has given its approval to Press' proposed license swap based on Press' representation that it intends to place its antenna within the top slot of the Bithlo tower. If Press is allowed to share Rainbow's top slot on the tower, the relocation will enable Press to compete directly with Rainbow and to serve exactly the same market area to be served by Rainbow.

19. The greater Orlando market is now served by four major commercial television stations. Rainbow believes that the market can accommodate a fifth commercial station, but does not believe the market can accommodate six stations. The presence of a sixth commercial

station in the market which begins broadcasting ahead of or at the same time as Rainbow's Channel 65 will substantially reduce Rainbow's viewing audience and may prevent Rainbow from achieving the minimum viewing audience required by television advertisers. If Rainbow is unable to achieve that minimum viewing audience, it will cease to be an economically viable commercial enterprise. Substantial doubt concerning Rainbow's future economic viability will in turn prevent it from obtaining the long-term financing it needs to operate the station successfully over the long term. Even if Rainbow is able to proceed and begin operation of its station, it will generate substantially less revenue than would have been generated in the absence of Defendants' breach. It was the recognition that obtaining the top slot on the Bithlo tower could be a significant factor in Rainbow's future economic success which led Rainbow to lease that slot well in advance of its need for antenna space, and which has led it to pay more than $300,000 in rent to Defendants since the Lease was executed.

20. Press' ability to enter the greater Orlando television market simultaneously with or ahead of Rainbow by securing space on the Bithlo tower which was already leased to Rainbow will cause severe and irreparable harm to Rainbow. Without the ability to secure a significant share of the viewing audience, Rainbow will lose millions of dollars of future profits and the market value of the station will decline substantially.

21. The January 6, 1986 Lease between Rainbow and Bithlo attached as Exhibit 2 is a valid and enforceable contract.

22. Rainbow has performed all of its obligations under the January 6, 1986 Lease and has satisfied all conditions imposed by that Lease.

23. Defendants' execution of a lease with Press which permits Press to occupy space already leased to Rainbow is a breach of the January 6, 1986 Lease between Rainbow and Defendants.

**Count I**
**Specific Performance**

24. Rainbow incorporates by reference the allegations contained in paragraphs 1 through 23 above.

25. Because Defendants' breach of the January 6, 1986 Lease is likely to result in the destruction of Rainbow's business, and because the subject matter of the Lease is unique, Rainbow can made whole only through specific performance of the January 6, 1986 Lease. Rainbow has no adequate remedy at law.

**Count II**
**Breach of Contract (Compensatory Damages)**

26. Rainbow incorporates by reference the allegations contained in paragraphs 1 through 23 above.

27. As a direct and proximate result of Defendants' breach, Plaintiffs have suffered and will continue to suffer substantial damages, including but not limited to:

a. loss of the expenditures made by Rainbow in reliance on the January 6, 1986 Lease, including but not limited to rent payments, engineering fees and the expenses of litigating legal challenges to Rainbow's construction permit;

b. loss of prospective profits from operation of Rainbow's television station;

c. diminution in the market value of Rainbow's television station; and

d. damage to Plaintiffs' professional reputation.

28. Each of the elements of damage enumerated in the preceding paragraph was within the contemplation of the parties at the time they entered into the January 6, 1986 Lease as the probable result of a breach by Defendants.

## Count III
## Fraud/Negligent Misrepresentation

29. Rainbow incorporates by reference the allegations contained in paragraphs 1 through 20 above.

30. Before, during and after the execution of the January 6, 1986 Lease, Defendants represented to Rainbow that the Bithlo tower was configured in such a way that there were only two non-overlapping positions for television antennas, one above the other, and that the two positions would be allocated to potential tenants on a "first come, first served" basis. That representation was contained in an October 21, 1985 letter written by Charles Sanford, Vice President of Defendant Gannett, attached as Exhibit 1, in a January 14, 1986 letter written by Richard Edwards, Gannett's Director of Engineering, attached as Exhibit 3, and in numerous oral communications between Rainbow and Defendants during meetings and telephone conversations leading up to and following the execution of the Lease.

31. The representations described in paragraph 30 above were false.

32. Rainbow discovered the falsity of the representations described in paragraph 30 above in October 1990, when Defendants informed Rainbow that it intended to lease space to another television broadcaster at the same level of the Bithlo tower as the space previously leased to Rainbow. Rainbow could not have discovered the falsity of those representations, by the exercise of reasonable diligence, prior to October 1990.

33. The facts misrepresented to Rainbow by means of the representations described in paragraph 30 above were material.

34. At the time they made the representations described in paragraph 30 above, Defendants knew that those representations were false, made the representations without knowledge as to their truth or falsity, or made the representations under circumstances in which Defendants should have known of their falsity.

35. Defendants intended the misrepresentations described in paragraph 30 above to induce Rainbow to take action or forbear from acting in reliance on those misrepresentations, including but not limited to Rainbow's act of entering into the January 6, 1986 Lease.

36. Rainbow relied on the representations described in paragraph 30 above and was justified in so relying. Had Rainbow known that there were two available positions for television antennas at the same level of the Bithlo tower, as it discovered in October 1990, it would not have entered into the January 6, 1986 Lease and would not have paid Defendants the more than $300,000 in rent it has paid since the Lease was executed.

37. As a direct and proximate result of Rainbow's justifiable reliance on the representations described in paragraph 30 above, Rainbow has suffered substantial damage, including damage which is distinct from the damage sustained as a result of Defendants' breach of the January 6, 1986 Lease.

38. The conduct alleged in this Count constitutes an independent tort.

WHEREFORE, Plaintiffs pray for judgment against Defendants, jointly and severally, and for the following relief:

A. with respect to Count I, a permanent injunction which prohibits Defendants from performing or proceeding with the lease agreement between Gannett and Press, which prohibits Defendants from leasing space on the Bithlo tower within Rainbow's aperture to any other broadcaster for the term of Rainbow's January 6, 1986 Lease, and which requires Defendants otherwise to comply with their obligations under that Lease;

B. with respect to Count II, judgment for the amount of Plaintiffs' compensatory damages, as determined by a jury, and interest as allowable by law;

C. with respect to Count III, judgment for the amount of Plaintiffs' compensatory damages, as determined by a jury, and interest as allowable by law;

D. the costs of this suit; and

E. such other and further relief as the Court deems just and proper.

**Jury Trial Demand**

Plaintiffs hereby demand a trial by jury of all issues so triable.

Respectfully submitted,

Margot Polivy
RENOUF & POLIVY
1532 Sixteenth Street, N.W.
Washington, D.C. 20036

- and -

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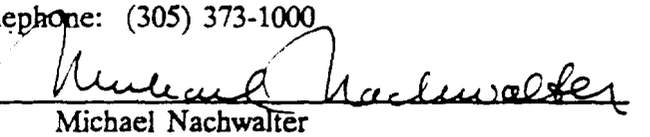
Dated: Nov. 5, 1991
Miami, Florida

By: 
Michael Nachwalter
Florida Bar No. 099989

Attorneys for Plaintiffs

## Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served by U.S. mail this 5th day of November, 1991, upon the following:

Donald W. Hardeman, Jr., Esq.
Law Offices of Donald W. Hardeman, Jr.
2 Datran Center, Suite 1215
9130 South Dadeland Boulevard
Miami, Florida 33156

Scott E. Perwin

11710003.pld

EXHIBIT 14

Guy Gannett Publishing Co.

JOHN R. DIMATTEO
PRESIDENT

ONE CITY CENTER, P.O. BOX 15277
PORTLAND, MAINE 04101
(207) 780-9000

November 26, 1990

Mr. Joseph Rey
Rainbow Broadcasting Co.
151 Crandon Blvd., #110
Key Biscayne, FL 33149

Re: Rainbow Broadcasting Co./Bithlo
Tower Co. Lease Agreement

Dear Mr. Rey:

We are disappointed at the need for such extensive legal involvement to resolve certain business matters between our companies. Using the law to resolve such issues is extremely time consuming and expensive for both of our companies.

In 1987, when you were in the process of perfecting your construction permit, you requested that our company provide you with relief with respect to certain payments required under our Lease. After discussions with Bob Gilbertson, we were able to accommodate your problem and we were glad to be able to do so.

As you know, we are in the process of trying to complete our Lease negotiations with Press Broadcasting (Channel 18). We have, up to this point, consistently indicated to you, as well as to Channel 18, that Channel 65 would be protected from interference from Channel 18 on the basis of the commencement date in your Lease. In order to continue to protect Channel 65, we need to have Exhibit C completed and attached to our Lease document.

including the exact description and location of your antenna. Enclosed is a draft of that Exhibit, but as you can see, we need additional input from you in order to complete it. We have also enclosed a draft of Exhibit B, required under the Lease, reflecting the building addition necessary to house your station. This is also in draft form. We understand that Channel 65 and Gannett have agreed on the contractor and the enclosed Exhibit reflects the project to be constructed. Your final input and agreement to this Exhibit is required for us to move ahead on the building. Both of these Exhibits B & C were originally left out of our lease agreement because of the need for future information. Time is of the essence.

I would like to have an opportunity to personally meet with you to discuss these Exhibits and your contention that we have in some way promised you exclusive use of the aperture around your antenna. It is important for both parties to get these matters behind us. Any further delays in getting Channel 18 on our tower will be damaging to Gannett.

Would you please let me know, at your earliest convenience, when it might be possible for us to get together so that we might find a mutually agreeable resolution to these problems.

Sincerely,

John R. DiMatteo

JRD:dlm
Enclosures

EXHIBIT 15

with a lesser impact on interstate activities.

*Id.*, 397 U.S. at 142, 90 S.Ct. at 847, 25 L.Ed.2d at 178 (citations omitted).

The *Pike* approach assumes that the statute does not discriminate against interstate commerce, and therefore it grants greater deference to the local interests. *Service Machine & Shipbuilding Corp. v. Edwards*, 617 F.2d 70, 75 (5th Cir.1980), *aff'd mem.*, 449 U.S. 913, 101 S.Ct. 310, 66 L.Ed.2d 142 (1980). Although this standard is not warranted since the challenged statute facially discriminates against interstate commerce, the court nevertheless finds that even if it were to apply the less rigorous *Pike* test, the statute could not survive scrutiny. Even if the court were to find that the state's interest is legitimate, the court determines that interstate commerce is subject to substantial restraints and, as stated above, there are less burdensome schemes available to preserve the local interests. The court concludes that in light of the other alternatives open to the state, the statute must be invalidated under the Supreme Court's *Pike* balancing test as well.

## VIII. CONCLUSION

Under the strict scrutiny test, Florida Statute § 686.201 violates the Commerce Clause. The statute facially discriminates against interstate commerce, and it is also discriminatory in its practical or probable effect. Even if the state's interest in ensuring that Florida sales representatives promptly receive their commissions were found to be legitimate, the statute would not survive constitutional scrutiny since there are alternative nondiscriminatory means available to promote the local purpose without discriminating against interstate commerce. The statute could be applicable to all manufacturers and importers, in-state and out-of-state.

Because the statute is unconstitutional under the Commerce Clause, it is unnecessary for the court to consider arguments regarding the constitutionality of the statute under the Privileges and Immunities Clause.

Based on the foregoing analysis, it is hereby:

ORDERED and ADJUDGED that Florida Statute § 686.201 is UNCONSTITUTIONAL under the Commerce Clause of the United States Constitution.

ORDERED and ADJUDGED that Defendants' Motion to Dismiss Plaintiffs' Claims under Florida Statute § 686.201 is GRANTED.

DONE and ORDERED.


**Joseph REY, Leticia Jaramillo, and Esperanza Rey–Mehr, as General Partners of Rainbow Broadcasting Company, a Florida Partnership, Plaintiffs,**

**v.**

**GUY GANNETT PUBLISHING CO., Individually Guy Gannett Publishing Co., doing business as Guy Gannett Tower Co., Guy Gannett Publishing Co., doing business as Bithlo Tower Company, Gannett Tower Company, Individually, MPE Tower, Inc., Individually, and Gannett Tower Company and MPE Tower, Inc. as General Partner and Co–Partners doing business as Bithlo Tower Company, a Florida General Partnership, Defendants.**

**No. 90–2554–CIV.**

United States District Court,
S.D. Florida.

June 6, 1991.

Television station brought suit seeking preliminary injunction to prevent owner of communications transmissions tower from leasing shared television antenna space on tower to competitor station. The District Court, Marcus, J., held that plaintiff was not entitled to preliminary injunction, in

absence of likelihood of success on the merits, or demonstration of irreparable harm.

Motion denied.

**1. Injunction ⇐147**

Plaintiffs bear burden of persuasion on all preliminary injunctive standards.

**2. Contracts ⇐152**

Under Florida law, when contractual language is clear and unambiguous, court cannot indulge in construction or interpretation of its plain meaning.

**3. Contracts ⇐143(2)**

Under Florida law, court may not violate clear meaning of a contract in order to create an ambiguity.

**4. Contracts ⇐143(2)**

Under Florida law, an ambiguity exists only when word or phrase in a contract is of uncertain meaning and may be fairly understood in more ways than one and is susceptible of interpretation in opposite ways.

**5. Contracts ⇐147(2), 152**

Under Florida law, if a contract is unambiguous, actual language used in contract is the best evidence of the intent of the parties, and contract terms should be given their plain meaning.

**6. Injunction ⇐138.9**

In order to demonstrate irreparable harm for purposes of preliminary injunction, plaintiff must show potential harm which cannot be redressed by legal or equitable remedy following a trial; preliminary injunction must be the only way of protecting plaintiff from harm.

**7. Injunction ⇐138.30**

Lessee of television antenna space on communications tower was not entitled to preliminary injunction prohibiting owner of tower from leasing antenna space to competing television station; lessee did not establish likelihood of success on the merits, as lease unambiguously provided that lessee rented such space on a nonexclusive basis; moreover, lessee failed to show that any irreparable harm might result from failure to grant injunction.

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Malcolm H. Fromberg, Coral Gables, Fla., for plaintiffs.

Charles C. Kline, Miami, Fla., for defendants.

## ORDER DENYING PRELIMINARY INJUNCTION

MARCUS, District Judge.

THIS CAUSE has come before the Court upon Plaintiffs' Motion for Preliminary Injunction against Defendants Guy Gannett Publishing Company, et al. ("Gannett"). Plaintiffs, Rainbow Broadcasting Company, et al. ("Rainbow"), seek the entry of a preliminary injunction to prevent the Defendants from leasing shared television antenna space on the Gannett Bithlo Tower in Bithlo, Florida to Press Broadcasting Company ("Press"). Plaintiffs claim that Defendants leased to them an "exclusive" top-slot antenna space on the Tower, and that Defendants' stated intention to lease antenna space to Press, overlapping with Plaintiffs' top antenna slot, violates the terms of their Lease agreement and would result in irreparable harm to their business. Plaintiffs also assert that they are now prepared to build and place their antenna on the top slot of the Tower. Defendants, on the other hand, argue that the Lease agreement does not grant to Plaintiffs exclusive use to the top television antenna space, that Plaintiffs have not shown irreparable harm, and that, at all events, Plaintiffs have an adequate remedy at law. Pursuant to the agreement of the parties, we conducted an evidentiary hearing on January 11, 16 and 23, 1991. After reviewing the evidence and for the reasons set forth at some length below in our Findings of Fact and Conclusions of Law, we hold that Plaintiffs' Motion for Preliminary Injunction must be DENIED.

### I. FINDINGS OF FACT

1. Defendant Gannett, a corporation organized under the laws of the state of Maine, (also referred to as "Landlord"

throughout the Complaint) owns a communications transmissions tower ("Tower") located in Bithlo, Florida, near Orlando. Gannett, a large media corporation, owns many broadcasting towers both for television and radio stations.

2. Plaintiff Rainbow (also referred to as "Tenant") is a Florida partnership whose general partners are Joseph Rey, Leticia Jaramillo and Esperanza Rey–Mehr. Rainbow is the permittee of television station Channel 65, Orlando, Florida, and desires to place and operate the antenna for the Station at a suitable location.

3. The Tenant–Plaintiff has been granted a Construction Permit issued by the Federal Communications Commission ("FCC") and, based upon Gannett's representations and the execution of a January 6, 1986, Lease Agreement with the Defendants, it filed a site change application and received FCC approval to relocate its antenna to the Tower and install its transmitter in the transmitter building on the Landlord's premises.

4. On January 6, 1986, the Plaintiffs entered into a Lease Agreement ("Lease") with Bithlo Tower Company through its General Partners, Gannett and MPE Tower, Inc.

5. The Lease by its terms plainly and unambiguously provides Rainbow only with "non-exclusive" use of the top television antenna space. In pertinent part, it states:

> All of the space, premises, and rights granted herein on a limited and a *non-exclusive* basis are hereinafter referred to as the "leased premises."

(emphasis added). Importantly, Article I of the Lease, entitled *Leased Premises,* explicitly includes "antenna space." We do not believe that the parties to this contract bargained for Rainbow's "exclusive" use of the top television antenna space on Gannett's Bithlo Tower. The contract specifically provides for "nonexclusive" use, and, we find that no one at Gannett ever represented to Rainbow that it would enjoy "exclusive" use of the top of the Tower. Indeed, according to the testimony of James Baker, Gannett Publishing's Vice President, which we credit, Gannett has never leased "exclusive" antenna space to any of its tenants on any of its towers.

6. The Lease, by its terms, grants Rainbow a television antenna position but provides that Rainbow will share the same or similar antenna space with other tenants. Article XII, *Interference,* reads:

> *Interference by Tenant.* Tenant understands that Landlord intends to grant to other tenants facilities and/or rights which are the same as, or similar to, those granted herein to Tenant. Tenant will endeavor in good faith to conduct its activities to cooperate with other tenants and potential tenants so as to anticipate and prevent interference.

7. According to the testimony of Richard Hoffman, Plaintiff's lawyer, the following clause in the Lease was added when Gannett was negotiating with Channel 52 for Channel 52 to place a television antenna on the Gannett Tower:

> The parties hereto expressly agree that the terms and conditions of this lease shall be binding only as they relate to the top television broadcasting antenna space located on the Bithlo Tower. If the top television broadcasting antenna space on the Bithlo Tower is otherwise occupied, this lease shall be null and void.

The clause pertained to and related solely to Gannett's then current negotiations to lease Channel 52, the top television antenna space on the Gannett Tower, and would have allowed Rainbow to declare the lease null and void only if Gannett leased the top television antenna space to Channel 52 before Rainbow's agreement of lease was fully executed by the required signatories.

8. Defendants/Landlords have advised the Plaintiffs/Tenants that they intend to allow a television competitor of Plaintiffs, Press Broadcasting Company, ("Press"), to occupy and share an antenna position within the aperture of the Tower's top slot. Press is ready to enter into a lease with Gannett for space on the Gannett Bithlo Tower.

9. In 1988, the Federal Communications Commission ("FCC") granted to Press a construction permit to operate Channel 68.

Channel 68 is a competitor of Rainbow and competes for the same advertising money, but does not now cover the same market area as Rainbow would cover.

10. Channel 68 has been on the air and broadcasting since 1988, and in 1989, the FCC gave permission for a "swap" whereby the Press Channel 68 will become Channel 18 and broadcast with an antenna from the Bithlo Tower.

11. The FCC approved the request by Press to move the Press antenna for placement on the Bithlo Tower. In order to meet the height requirement set by the FCC, some portion of the Press antenna would have to be located at the same height as some portion of the Rainbow antenna, but the Press antenna would be located physically on a different leg or face of the Bithlo Tower than the Rainbow television antenna. Rainbow unsuccessfully opposed the Channel 68/18 swap before the FCC.

12. Rainbow has not yet selected or purchased an antenna to go on the Gannett Bithlow Tower; nor has it selected a proper transmitter. Rainbow only held a construction permit which was scheduled to expire on January 31, 1991. Rainbow also has not obtained any financing commitment for the project.

13. Susan Harrison, appearing on behalf of Rainbow, testified that, should Rainbow (Channel 65) become the fifth commercial station in the Orlando market, she could reasonably forecast the cash flow of the station in any given year as well as evaluate the future fair market value of the station.

14. The FCC allocates television stations for a given area. The overall policy of the FCC is to promote competition in the best interests of the general public.

15. The Plaintiffs have not established that the placement of a second antenna on a face or leg of the Tower would result in any significant interference to Rainbow's operation. Leonard Spragg, called by Plaintiffs as an expert electronics consulting engineer, testified, among other things, that an engineering study would be required to determine what impact a second antenna would have on the same tower, and that no such study—a costly undertaking—had been made. He added that he lacked the expertise required to make the necessary calculations to determine any modifications in coverage. Spragg also testified that it was not uncommon for television antennas to overlap or share space on the same tower. Richard Edwards, Vice President and Director–Engineer for Gannett, also testified, and, observed that Gannett has often mounted more than one antenna with shared aperture on the same tower. Edwards added that more than one antenna could technically share space on the Bithlo Tower, that any projected interference could be mathematically computed, and that interference was not anticipated on the Bithlo Tower.

## II. CONCLUSIONS OF LAW

### A. *Prerequisites To Injunctive Relief*

[1] It is undisputed that under federal law in this Circuit Plaintiffs must prove four elements to obtain a preliminary injunction. Pursuant to Fed.R.Civ.P. 65, a district court is reposed with discretionary power to grant preliminary injunctive relief. *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir.1983); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 332 (5th Cir.1981). In exercising its discretion, however, the court must evaluate and balance four recognized prerequisites to preliminary injunctive relief: (1) a substantial likelihood that the movant will prevail on the underlying merits of the case; (2) a substantial threat that the moving party will suffer irreparable damage if relief is denied; (3) a finding that the threatened injury to the movant outweighs the harm the injunction may cause defendant; and (4) a finding that the entry of a preliminary injunction would not disserve the public interest. *Tally–Ho, Inc. v. Coast Community College District*, 889 F.2d 1018, 1022 (11th Cir.1989). It is also well established in this Circuit that Plaintiffs bear the burden of persuasion on *all* four preliminary injunctive standards.

*United States v. Jefferson County*, 720 F.2d 1511 (11th Cir.1983).

Moreover, in exercising its discretion, a court is guided by established rules and principles of equity jurisprudence. *Muss v. City of Miami Beach*, 312 So.2d 553, 554 (Fla.3d DCA), *cert. denied*, 321 So.2d 553 (Fla.1975). And we are reminded that "a preliminary injunction is an extraordinary and drastic remedy"; it is the exception and not the rule. *Canal Authority v. Callaway*, 489 F.2d 567, 573 (5th Cir.1974).

Because we believe that Plaintiffs have failed to meet their burden of persuasion on each of the prerequisites, the motion for preliminary injunction relief must be denied.

B. *Substantial Likelihood of Success*

As a threshhold matter the Plaintiffs argue that the Lease agreement between Rainbow and Gannett grants Rainbow "exclusive" use of the top television antenna space on the tower. Plaintiffs rely principally on the Lease and the Lease's "Exhibit C." As to the Lease, Plaintiffs only point to the following clause which appears at the beginning of the document:

> The parties hereto expressly agree that the terms and conditions of this lease shall be binding only as they relate to the top television broadcasting antenna space located on the Bithlo Tower. If the top television broadcasting antenna space on the Bithlo Tower is otherwise occupied, this lease shall be null and void.

Plaintiffs suggest that this clause evidences that it entered into the Lease with the binding understanding that its leased space was an "exclusive" one at the top slot of the Tower. We disagree. In the first place, this clause is silent on the issue of "exclusivity"; it only states that the Lease will be void if the top slot is occupied at the time the Lease is executed. In fact, the testimony at the hearings illustrated that the clause pertained to and was related solely to Gannett's then current negotiations to lease Channel 52 the top antenna space on the Bithlo Tower, and would have allowed Rainbow to declare the lease null and void only if Gannett had leased the top space to Channel 52 before Rainbow's agreement of lease was fully executed by the required signatories. The clause says nothing about sharing space or overlapping antennas. And, as we have already observed, it is not an uncommon practice for television antennas to overlap with other antennas on the same tower.

[2–5] In the second place, the plain language of the agreement of lease does not grant Plaintiffs "exclusive" use of the top television antenna space. It is well-settled that when contractual language is clear and unambiguous, the court cannot indulge in construction or interpretation of its plain meaning. *Hurt v. Leatherby Insurance Company*, 380 So.2d 432 (Fla.1980). A court may not violate the clear meaning of a contract in order to create an ambiguity. *Hoffman v. Robinson*, 213 So.2d 267 (Fla. App.1968). An ambiguity exists only when a word or phrase in a contract is of uncertain meaning and may be fairly understood in more ways than one and is susceptible of more than one meaning and of interpretation in opposite ways. *Friedman, et al. v. Virginia Metal Products Corp.*, 56 So.2d 515 (Fla.1952). But, if a contract is unambiguous, the actual language used in the contract is the best evidence of the intent of the parties, and the contract terms will be given their plain meaning. *Herrero v. Herrero*, 528 So.2d 1286 (Fla.2d DCA 1988).

The Lease may "fairly" be interpreted in only one way. Its terms are unambiguous and its meaning plain. As set forth above, the agreement specifically does not grant "exclusive" use of the top slot of the Bithlo Tower. Rather it says:

> All of the space, premises, and rights granted herein on a limited and a *non-exclusive* basis are hereinafter referred to as the "leased premises."

(emphasis added). We can only find from a clear reading that Rainbow's antenna space was granted, pursuant to the unambiguous terms of the lease, on a "... non-exclusive basis...." In addition, Article XII, *Interference*, states in pertinent part:

> (a) *Interference By Tenant.* Tenant understands that landlord intends to grant

> to other tenants facilities and/or rights which are the same as, or similar to, those granted herein to tenant.

Once again, the Lease unambiguously says that Rainbow's antenna space will be granted on a "non-exclusive" basis. In light of this clear language Plaintiffs have not shown a substantial likelihood of success on the merits as to this dispositive issue. Moreover, we have found that Gannett never promised Plaintiffs "exclusive" use of the Tower, nor did the parties bargain for "exclusive" use.

As to Exhibit C of the Lease, Plaintiffs argue that this engineering diagram, depicting the Tower's configuration and available spaces for antennas, demonstrates that Rainbow had "exclusive" rights to the top slot of the Tower. First, Defendants have argued that Exhibit C was not part of the Lease, was not agreed to by the parties, and was never executed by Gannett. Plaintiffs, on the other hand, asserted that the Exhibit was attached to their final version of the Lease. Putting that dispute aside, we believe in any event that Exhibit C does not help on the "exclusivity" issue, but rather only illustrates a standard proposal for the Tower's structure with height and mounting configurations. Indeed, Plaintiffs' engineering expert, Mr. Leonard Spragg, testified that Exhibit C is a "standard" engineering document executed when the Lease has received FCC approval and the antenna agreements are finalized. Mr. Spragg testified that although Exhibit C shows two antenna spaces, one above the other, the Exhibit, along with the notes, only depict the "type" of antenna one should purchase for the specific tower, and he observed that the Exhibit did not deal with "exclusivity" issues or even made reference specifically to Rainbow. In fact, Mr. Spragg stated that Plaintiffs hired him to select the appropriate antenna and that Plaintiffs asked him to look into an antenna similar to the one used by Channel 33, which Mr. Spragg admitted was placed in a tower "overlapping" other antennas. Mr. Spragg also offered the view that Exhibit C cannot "lock" a tenant to an actual location of antennas since Exhibit C only deals with general heights and types of antennas which should be purchased.

Exhibit C, even if part of the Lease, does not prove in any way that Rainbow received an "exclusive" slot simply because its slot was depicted as the top one in the diagram. Exhibit C is in fact a standard engineering diagram designed to illustrate the proposed heights and providing other "general" engineering information. The diagram, as we read it, does not illustrate that a proposed slot on the diagram can only carry one antenna. Mr. Spragg also testified that other towers throughout the United States located in Miami, San Francisco, Atlanta, New York, and Washington, D.C., which use the same standard exhibits as Exhibit C in their leases, have overlapping antennas mounted on different faces of a tower. At all events, in light of the unambiguous language of the Lease, Plaintiffs have not likely proven that they bargained for an "exclusive" top slot. W add that the Lease was a product bargained for at arms length by attorneys who were aware of the Lease's provisions regarding non-exclusivity. In fact, the Plaintiffs' attorney, Mr. Hoffman, could not testify that the issue of "exclusivity" was even addressed during negotiations. Mr. Hoffman specifically stated that all he understood was that he was to bargain for the "top slot." He did not recall that "exclusivity" was discussed and admitted that he did not object to the explicit provision contained in the Lease stating that the "leased premises" were leased on a "non-exclusive" basis. Plaintiffs' failure to sustain its burden on this matter alone compels us to deny the motion.

C. *Irreparable Harm*

[6] Even assuming that Plaintiffs would likely prevail on the merits, they have failed to carry their burden on irreparable harm. We are reminded that when looking at irreparable harm,

> the key word in this consideration is "irreparable." Mere injuries, however substantial, in terms of money, time, and injury necessarily expended in the absence of a stay are not enough. The possibility of adequate compensatory or

other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

*United States of America v. Jefferson County*, 720 F.2d 1511 (11th Cir.1983). And it is well settled that in order to demonstrate irreparable harm, the Plaintiffs must show potential harm which cannot be redressed by a legal or equitable remedy following a trial. The preliminary injunction must be the only way of protecting the Plaintiffs from harm. *Instant Air Freight Company v. C.F. Air Freight, Inc.*, 882 F.2d 797 (3d Cir.1989).

Plaintiffs rely on the testimony of Susan Harrison, a principal of a Washington, D.C. consulting firm in television systems, who testified that if Press is allowed to come onto the market "before" Rainbow, then Rainbow will lose the opportunity to attract sufficient advertisers and audience share necessary to become a viable station. Despite this testimony, Ms. Harrison essentially illustrated that Plaintiffs had other legal remedies available. Ms. Harrison opined that should Channel 65 become the fifth commercial station in the Orlando area and thereby "beat" Press into the marketplace, it could expect an audience share of 4% to 5%. Ms. Harrison calibrated the revenue and cash flow in the fifth to sixth year of operation as likely to be some $5,000,000.00 per year. Furthermore, she projected a fair market value of $40,000,000.00 to $50,000,000.00 for the station. These careful projections suggest that a damage remedy may be available to Plaintiffs. Damages seem to be quantifiable with reasonable accuracy, and a monetary award would provide adequate compensation for claimed harm. *See, e.g., PDL Vitari Corp. v. Olympus Industries, Inc.*, 718 F.Supp. 197 (S.D.N.Y.1989).

Moreover, Plaintiffs' injury can neither be remote nor speculative, but rather must be actual and imminent in order to obtain injunctive relief. *Consolidated Brands, Inc. v. Mondi*, 638 F.Supp. 152 (E.D.N.Y. 1986). Rainbow's claim of damages, however, appear speculative and remote. First, Rainbow has not arranged financing; a note for financing has not been completed. As there is no convincing proof that Rainbow actually has financial backing, the claim of irreparable harm appears speculative. Second, and more important, although an injunction may be granted where the prospective breach threatens the destruction of an "ongoing" business, *Semmes Motors, Inc. v. Ford Motor Company*, 429 F.2d 1197 (2d Cir.1970), Plaintiff's business cannot truly be characterized as ongoing. At this point, Rainbow only owns a construction permit and a lease. The evidence illustrated that since 1982, Rainbow has yet to obtain financing, has not selected or purchased an antenna, has not selected a wave guide, has not selected a transmitter, has not obtained building plans for a broadcast building and has not gone on the air. In short, Plaintiffs have not likely proven that their business is ongoing and in fear of destruction. Again, these circumstances do not warrant the issuance of a preliminary injunction.

D. *Balance of Hardships*

Since Plaintiffs have neither established a likelihood of success on the merits nor irreparable harm, we need not address the other prerequisites. However, it is worth noting again that Plaintiffs' perceived threat remains speculative as it has not contracted for an antenna, selected a wave guide, or drawn plans for a broadcasting, while Gannett has a ready tenant who is willing to immediately go on the Tower at a rent that was approximated at $70,000.00 per year. Under these circumstances, Plaintiffs have not convincingly established that the balance of harms tips decidedly in their favor.

E. *Public Interest*

Finally, Plaintiffs must demonstrate that injunctive relief will not disserve the public interest. The granting of preliminary injunctive relief in this case, however, will disserve the public interest. The FCC has shown its intention to encourage competition in such regulations as 47 CFR Ch. 1 § 73.635. The FCC, in *The Matter of Policies Regarding Detrimental Effects of Proposed New Broadcasting Stations on*

*Existing Stations*, 3 FCC Rcd 3, Pg. 638, specifically abandoned the *Carroll* doctrine which had allowed the FCC to consider proof of detrimental economic effect upon an existing station before granting a license to a new station. The FCC held that such considerations were anti-competitive in nature and that competition was in the public interest. We note that as a general rule, federal courts defer to and follow policies created by federal agencies since "there is a presumption of regularity of administrative action," *Mountain States Telephone & Telegraph Co. v. United States*, 499 F.2d 611, 615, 204 Ct.Cl. 521 (1974), and courts are "loath" to disrupt or interfere with administrative practices. *Girard Trust Bank v. United States*, 602 F.2d 938, 221 Ct.Cl. 134 (1979).

In addition, the FCC, in its decision concerning the Channel 68/18 swap, once again reiterated its policy of encouraging competition. The FCC in *Amendment of § 73.606(b), Table of Allotments, Television Broadcast Stations (Clermont and Cocoa Florida)*, 67 RR 2d pg. 265, 269, stated that it would not deny the Channel 68/18 exchange on grounds brought forward by CCI (Community Communications, Inc., licensee of public television station WMFE–TV Orlando), that CCI would suffer a significant loss of viewers should the swap be allowed. The FCC specifically stated: "... even if CCI runs the risk of losing viewers, we cannot prevent a channel expansion solely to protect a broadcaster from competition." In the case at bar, Rainbow seeks to prevent competition. We cannot find that granting injunctive relief would serve the public interest. Indeed, federal courts have long emphasized the policy that "[i]n a competitive market the customers will pick the arrangements that work best for them.... [u]nless courts insist on a showing of market power, they run the risk of deleting one of the existing options and so reducing rather than enhancing the vigor of competition and the welfare of consumers." *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir.1985). Furthermore, as to the view that the maintenance of competition is in the best interests of the public welfare, the Supreme Court has noted: "[laws have been] enacted to assure customers the benefits of competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market.... [laws which protect competition] are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 103 S.Ct. 897, 908, 908 n. 38 (1983).

[7] In light of the foregoing and because Plaintiffs have failed to sustain their burden, it is hereby

ORDERED AND ADJUDGED that Plaintiffs' Motion for Preliminary Injunction is DENIED.

DONE AND ORDERED.


**BURGER KING CORPORATION, Plaintiff,**

**v.**

**Robert L. LEE and Sierra Lee, Inc., a California corporation, Defendants.**

**No. 90–1956–CIV.**

United States District Court,
S.D. Florida.

June 12, 1991.

Action alleging breach of franchise agreement was filed by franchisor based on franchisee's claimed failure to pay for certain royalties, advertising and promotional and training material. Franchisor moved for preliminary injunction. The District Court, Marcus, J., held that: (1) franchisor was entitled to preliminary injunction prohibiting its former franchisee from using any of the franchisor's trademarks

EXHIBIT 16

Ch 18

# LEASE AGREEMENT

This Lease Agreement is made and entered into this 25th day of June, 1991 by and between Guy Gannett Publishing Co., a Maine corporation with offices in Miami, Florida doing business as Bithlo Tower Company ("Landlord"), and Press Broadcasting Company, a NEW JERSEY corporation, with offices in NEPTUNE, NEW JERSEY ("Tenant").

## WITNESSETH

WHEREAS, Landlord is the owner of certain real property ("Premises") located at Bithlo, Florida more particularly described on Exhibit A hereto; and

WHEREAS, Landlord has erected on the Premises a communications transmission tower ("Tower") substantially as described in Exhibit C hereto and a transmitter building (the building with any and all future additions thereto, hereinafter the "Transmitter Building"); and

WHEREAS, Tenant is the Federal Communications Commission ("FCC") licensee for Television Station 18, CLERMONT/ORLANDO Florida (the "Station") and desires to place and operate the antenna for the Station at a location on the Tower, said location being described in Exhibit C hereto (the "Antenna Space"), to install and to maintain at Tenant's expense certain transmission lines from the Station's transmitter equipment across or under portions of the Premises and through or upon the Tower to the Antenna Space, and to occupy an area in an addition (to be constructed)to the Transmitter Building as shown on Exhibit B-1 hereto (the "Tenant's Space") in which to locate the Station transmitter and related equipment; and

WHEREAS, Tenant requires other space on the Premises for the installation of Tenant's generator and related fuel storage tank and one satellite earth station, with the further right to interconnect such equipment with equipment in the Tenant's Space in the manner provided herein; and

WHEREAS, Tenant has applied for and has received a construction permit issued by the FCC (the "Construction Permit") to locate its antenna on the Tower and to install its transmitter in the Transmitter Building, which Construction Permit approval is subject to a Petition for Reconsideration and Stay filed by Rainbow Broadcasting Company;

NOW, THEREFORE, in consideration of Tenant's obligation to pay rent and in consideration of the mutual rights, obligations, terms, covenants, and provisions hereof, the parties mutually agree as follows:

ARTICLE I

LEASED PREMISES

Landlord, for and in consideration of the covenants and conditions herein mentioned, reserved and contained, to be kept and performed by Tenant, and the rents to be paid by Tenant hereunder, does hereby grant to Tenant, for the rental periods described herein, and Tenant does hereby take from Landlord for said periods, upon and subject to the covenants and conditions herein contained, the following:

(a) Antenna Space. The Antenna Space for the installation and operation of Tenant's antenna all as more particularly described in Exhibit C hereto; and

(b) Tenant's Space. Occupancy of the Tenant's Space within the Transmitter Building, as more particularly described on Exhibit B-1 hereto, for installation and operation of Tenant's transmitter and related equipment; and

(c) Generator Space. Occupancy of an additional area of space outside the Transmitter Building at a location of Landlord's selection within the general area designated therefor on Exhibit B-2 for placement and use of Tenant's generator and generator fuel tank (which shall comply with all applicable laws, rules and ordinances) and further spaces at locations of Landlord's selection, within the down link area generally designated on Exhibit B-2 hereto, for the installation of two (2) earth stations (not to exceed 10 meters in diameter), with the further right to install, maintain, repair, replace and remove underground wires or connecting pipes over courses to be designated by Landlord; and

(d) Access. The right, in common with others, to use the roadways constructed by Landlord on the Premises for ingress and egress to and from the Transmitter Building and Tower as reasonably necessary for purposes of Tenant's installation, removal, servicing, maintenance and repair of Tenant's equipment therein; and

(e) Transmission Lines. The limited and non-exclusive right to install and to maintain a transmission line from the Tenant's Space to the Antenna Space, generally at the locations and to the extent specified on Exhibit C, and to install and maintain a microwave antenna dish and associated auxiliary equipment on the Tower (at the locations determined by Landlord in its sole reasonable discretion, which shall include location on an auxiliary tower of sufficient height on Landlord's Premises), all for the sole purpose of enabling Tenant to conduct its broadcasting activities; and



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(f) Utility Lines. The right, in common with others, at Tenant's expense, to connect to power, telephone and utility lines in the Transmitter Building.

All of the space, premises and rights granted under this Article I are demised and leased on a limited and non-exclusive basis and are hereinafter sometimes referred to as the "Leased Premises". Tenant's use of the Leased Premises shall be limited to broadcasting activities associated with the broadcast operations of the Station.

ARTICLE II

TERM

(a) TO HAVE AND TO HOLD the Leased Premises for an Initial Term commencing on the date hereof (the "Commencement Date") and expiring at midnight on the date fifteen (15) years following the first day of the calendar month ~~next following~~ the Commencement Date, unless this Lease is sooner terminated as hereinafter provided. The Lease shall automatically renew for a First Renewal Term of five (5) years, commencing at 12:01 A.M. on the day following the date of expiration of the Initial Term, unless at least six months prior to the expiration of the Initial Term, Tenant shall have given written notice to Landlord stating that Tenant does not intend to renew the Lease for a First Renewal Term. If the Lease shall automatically renew for a First Renewal Term as herein provided, then at the end of said First Renewal Term, the Lease shall again automatically renew for a Second Renewal Term of one (1) year commencing at 12:01 A.M. on the day following the date of expiration of the First Renewal Term, unless, at least six (6) months prior to the expiration of the First Renewal Term, Tenant shall have provided written notice to Landlord stating the Tenant does not intend to renew the Lease for a Second Renewal Term. The initial and each of the Renewal Terms, if any, shall be subject to all of the terms and conditions set forth in this Lease.

15 years
15.15
June 30
+ 5 years
1 year
21 years
2012

(b) Holding Over. If Tenant or anyone claiming under Tenant shall remain in possession of the Leased Premises or any part thereof after the expiration of the term of this Lease or any renewal thereof without any agreement in writing between the Landlord and Tenant with respect thereto, prior to acceptance of rent by Landlord, the person remaining in possession shall be deemed a tenant at sufferance, and, after acceptance of rent by Landlord, the party remaining in possession shall be deemed a tenant from month to month, subject to the provisions of this Lease insofar as the same may be made applicable to a tenancy from month to month. The rental during any such period shall equal one hundred fifty percent (150%) of the rental in effect immediately preceding such expiration.

ARTICLE III

RENT

(a) Tenant covenants and agrees to pay Landlord for the Leased Premises during the Initial Term of this Lease and any Renewal Terms hereunder the amounts set forth at Exhibit D attached hereto and incorporated herein (the "Rent"). Except as otherwise specifically provided in Exhibit D, installments of Rent shall be paid in advance (without prior notice or invoice by Landlord) on or before the first day of each month, and any amounts which are payable when invoiced hereunder shall be due within twenty (20) days after Tenant's receipt of such invoice.

(b) Landlord has constructed the Transmitter Building for the ownership, use and occupancy of all tenants sharing rental placements on the Tower. Landlord agrees to construct an addition to the Transmitter Building as provided in Exhibit B hereto for the use and occupancy of the Tenant during the term of this Agreement subject to the provisions of Article IV(C) hereof. Landlord shall also construct a bridge connecting said addition to the Tower.

Tenant's interest in the Transmitter Building at any given time shall be that fraction determined by dividing the total number of square feet in Tenant's Space by the total number of square feet in the Transmitter Building. For purposes of the preceding computation, to account for the height of ceilings in Tenant's Space, the number of square feet in the Transmitter Building shall be equal to the sum of the square footage of the floor area in the Tenant's Space plus an additional ten percent (10%) of said amount for each foot of ceiling height in excess of ten (10) feet, and the total square feet in the Transmitter Building shall be increased accordingly. Tenant's interest in the Transmitter Building may be transferred only to Tenant's successors and assigns under the Lease. Upon expiration or earlier termination of the Lease, Tenant's interest in the Transmitter Building shall become the property of Landlord. Landlord shall have the right to admit additional tenants to ownership in the Transmitter Building, provided that such admission shall not, in Landlord's sole reasonable discretion, result in a substantial disturbance to Tenant's occupancy of Tenant's Space. Any funds received by Landlord with respect to such new owner's interest in the Transmitter Building shall belong to Landlord.

Notwithstanding any other provision of this Lease concerning Landlord's obligations, Tenant shall reimburse Landlord for all costs of insuring the Tenant's Space when and as invoiced.

Landlord shall maintain the Transmitter Building (but not the interior portions of the Tenant's Space) so as to comply with existing rules and regulations imposed by any governmental



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